



United States Attorney  
Southern District of New York

United States District Courthouse  
300 Quarropas Street  
White Plains, New York 10601

April 1, 2014

**BY HAND**

Honorable Loretta A. Preska  
Chief Judge  
United States District Court  
Southern District of New York  
United States Courthouse  
500 Pearl Street  
New York, NY 10007

Re: *United States v. Kerik*, 07 Cr. 1027 (LAP)

Dear Judge Preska:

We write in response to Kerik's Motion To Unseal And Vacate Protective Order of March 25, 2014 ("Kerik's Motion"). For the reasons stated herein, the Government opposes Kerik's Motion and requests that Kerik be ordered to return the discovery material provided to him by the Government as he is obligated to under the terms of the Protective Order.

Kerik incorrectly and incompletely states that "the Government moved to *seal the record in the case* through protective order and said order was granted on March 19, 2008." (Emphasis supplied). Tellingly, Kerik does not attach the order in question to his moving papers. In fact, the Protective Order On Consent issued by then-Judge Stephen C. Robinson on March 19, 2008 ("the Order"), a copy of which is attached hereto as Exhibit A: a) was sought by the Government *and* Kerik; b) did not "seal the record in the case"; c) acted only to place limits on the uses to which Kerik could put materials furnished to him in discovery; and d) directed Kerik to return all of the said discovery materials to the Government "at the end of the criminal proceeding." Subsequent to the entry of the Order, Kerik pleaded guilty to numerous felony charges in satisfaction of the Indictment. He was sentenced and unsuccessfully appealed his sentence. *United States v. Kerik*, 419 Fed. Appx. 10 (2d Cir. 2011).

After Kerik had exhausted his direct appeal, his counsel, Raymond Mansolillo, Esq. – the very same attorney who brought on the instant motion – wrote to Your Honor and specifically requested that he be included on, and bound by the terms of, the Order so that he could review Kerik's file and determine whether Kerik would seek relief under Title 28, United States Code, Section 2255. The Government consented to that request which was granted by Your Honor. A copy Mr. Mansolillo's letter "So Ordered" by Your Honor is attached hereto as Exhibit B.

Kerik is in violation of the terms of the Order. Kerik has exhausted his appellate remedies, and the statute of limitations has long run on any putative petition pursuant to Title 28, United States Code, Section 2255. Accordingly, "the criminal proceeding" referenced in the Order is over. Notwithstanding that, Kerik has not returned a single document of the voluminous discovery that the Government provided to him in this case. Whatever excuse he may have had for such non-compliance owing to his imprisonment is now without moment as he has completed his sentence. Judge Robinson's Order should, therefore, be enforced and Kerik ordered to return the documents to the Government forthwith.

Kerik's Motion for unsealing is couched mainly in terms of the public's right of access to judicial records and documents. The fundamental flaw in that argument is that the records in question were never filed in court and are not judicial records and documents, but were merely materials turned over to Kerik in discovery in keeping with the Federal Rules of Criminal Procedure. Documents and information provided in discovery are not "judicial documents" and the public and third parties have no presumptive or traditional right of access to them. See *United States v. Caparros*, 800 F.2d 23, 25-26; *United States v. Gangi*, 1998 WL 226196 (S.D.N.Y.) at \*3. Further, there is a strong public interest in the free flow of information to law enforcement, an interest that would be compromised if the relief Kerik seeks here were to be granted. See *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). As the Second Circuit has observed:

...[o]fficials with law enforcement responsibilities may be heavily reliant upon the voluntary cooperation of persons who may want or need confidentiality. If that confidentiality cannot be assured, cooperation will not be forthcoming.... If release is likely to cause persons in this particular case or in future cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.


*Id.* The privacy interests of third parties thus weigh heavily in favor of the continued sealing of the materials in question. That is especially the case because a good deal of the materials in question consists of Jencks Act/3500 material including the grand jury testimony of witnesses who never made a public appearance in this case inasmuch as it terminated with multiple guilty pleas by the defendant.

In short, there is no legal basis that would permit the wholesale unsealing here of what is tantamount to the Government's entire investigation in a criminal case. Indeed, such an unsealing would be unprecedented. Kerik, who agreed in the Order that he "ha[d] no ownership or proprietary interest in the materials subject to [it]," should, as he agreed to do and was ordered

to do, return the materials to the Government immediately, and his motion for unsealing those materials should be denied.

Respectfully submitted,

PREET BHARARA  
UNITED STATES ATTORNEY

By:   
Elliott B. Jacobson  
Perry A. Carbone  
Assistant United States Attorneys

Attachments

cc: Raymond Mansolillo, Esq. (by fax and mail)

# EXHIBIT A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA

-v-

BERNARD B. KERIK,

Defendant.  
-----X

:  
:  
: PROTECTIVE ORDER ON CONSENT  
:  
:  
:

: 07 Cr. 1027 (SCR)  
:  
:  
:  
:  
:

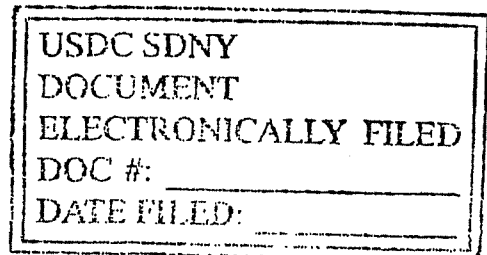
Upon the application of the United States Attorney for the Southern District of New York and Bernard B. Kerik, the defendant herein, for the entry of a protective order having the consent of both parties and for good cause,

IT IS HEREBY ORDERED THAT:

1. Documents provided by the Government to the defense pursuant to Federal Rule of Criminal Procedure 16; Title 18, United States Code, Section 3500; *Brady v. Maryland*; or *United States v. Giglio*, to the defense in this action are deemed confidential. Confidential information disclosed to the defendant and his counsel during the course of proceedings in this action:

a. Shall be used by the defendant and his counsel solely for purposes of this criminal action; and

b. Shall not be disclosed in any form by the defendant or his counsel except as set forth in paragraphs 2 and 4 below.



2. Confidential information may be disclosed by the defendant or his counsel only to the following designated persons: (i) all personnel employed by the defendant's counsel, either full-time or part-time; (ii) independent expert witnesses or advisors retained by the defendant or his counsel in connection with the criminal case; (iii) transactional witnesses, to the extent deemed necessary by defense counsel for trial preparation; and (iv) such other persons as hereafter may be authorized by the Court upon motion by the defendant. Copies of documents containing confidential information may not be given to or remain in the custody of transactional witnesses.

3. The defendant agrees that he has no ownership or proprietary interest in the materials subject to this Protective Order. The defendant further agrees that all such materials are to be returned to the Government at such time as they are no longer needed in this action, at the end of the criminal proceeding, or upon Order of the Court, whichever occurs first.

4. The provisions of this Order shall not be construed as preventing the disclosure of any information in any motion, hearing, or trial held in this action or to any Judge or Magistrate Judge of this Court for purposes of this action.

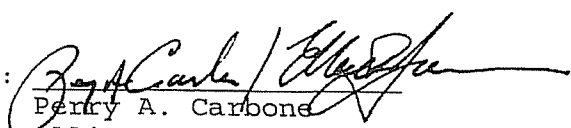
5. This Order is in addition to and does not  
supersede any prior protective order or stipulation.

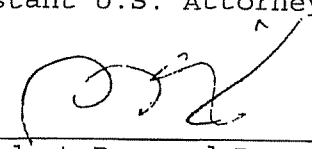
Dated: White Plains, New York  
March 19, 2008

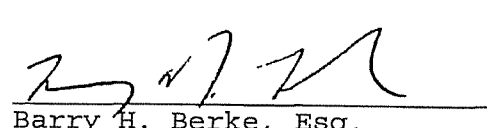
Accepted and Acknowledged:

UNITED STATES ATTORNEY  
MICHAEL J. GARCIA

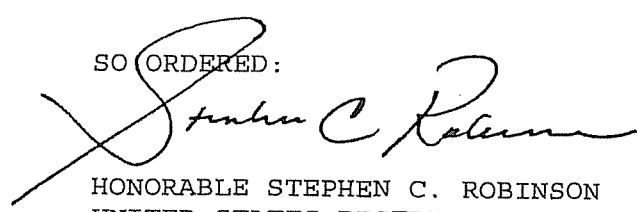
BY:

  
Perry A. Carbone  
Elliott B. Jacobson  
Assistant U.S. Attorneys

  
Defendant Bernard B. Kerik

  
Barry H. Berke, Esq.  
Eric A. Tirschwell, Esq.  
(Counsel for Bernard B. Kerik)

SO ORDERED:

  
HONORABLE STEPHEN C. ROBINSON  
UNITED STATES DISTRICT JUDGE

# EXHIBIT B

**COLOIAN MANSOLILLO LLC**  
ATTORNEYS AT LAW

May 15, 2012

Honorable Loretta A. Preska  
Chief Judge United States District Court  
Southern District of New York  
United States Courthouse  
500 Pearl Street  
New York, NY 10007

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 5/16/12

RE: Request for new counsel to be "so ordered" included in Protective Order on Consent.

Dear Chief Preska,

I kindly ask for your indulgence in accepting the following request via facsimile: I have been retained by Mr. Bernard Kerik (pro bono) to make a determination if a {2255 (*Post Conviction Relief Motion to Vacate, Set Aside or Reduce Sentence*)} is warranted in his case and if so to file such. After several communications between Assistant United States Attorney Perry Carbone, Eric Tirschwell (previous counsel to Mr. Kerik) and myself, it appears we have reached an accord as to the most efficient and expeditious manner in which I, as new counsel, may obtain access to Mr. Kerik's complete file for review. (See attached order – "Protective Order on Consent" – 07 cr 1027 [SCR]).

As such and in satisfaction of all interested parties, I respectfully request that the Court "so order" my inclusion as new counsel in the "Protective Order on Consent" (attached).

I hereby agree to be bound by the terms and conditions of said Order or any new or modified Order imposed by this Court. (Assistant United States Attorney Carbone on behalf of the Government does not oppose such request and has made such averment in an e-mail communication to me on May 11, 2012 at 8:44 a.m.)

Sincerely,

*[Signature]*  
Raymond Mansolillo, ESQ  
Coloian-Mansolillo, LLC  
Boston Office: (617) 342-7080  
Providence Office (401) 861-9400

SO ORDERED

*[Signature]*  
LORETTA A. PRESKA  
UNITED STATES DISTRICT JUDGE

May 16 2012

Encl: Protective Order on Consent – Kerik, Bernard – March 19, 2008

cc: Perry A. Carbone, ESQ.  
Assistant United States Attorney  
Southern District of New York

Erick Tirschwell, ESQ  
Kramer Levin  
(previous counsel)

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED:

Case 7:07-cr-01027-SCR Document 28 Filed 03/20/08 Page 2 of 3

2. Confidential information may be disclosed by the defendant or his counsel only to the following designated persons: (i) all personnel employed by the defendant's counsel, either full-time or part-time; (ii) independent expert witnesses or advisors retained by the defendant or his counsel in connection with the criminal case; (iii) transactional witnesses, to the extent deemed necessary by defense counsel for trial preparation; and (iv) such other persons as hereafter may be authorized by the Court upon motion by the defendant. Copies of documents containing confidential information may not be given to or remain in the custody of transactional witnesses.

3. The defendant agrees that he has no ownership or proprietary interest in the materials subject to this Protective Order. The defendant further agrees that all such materials are to be returned to the Government at such time as they are no longer needed in this action, at the end of the criminal proceeding, or upon Order of the Court, whichever occurs first.

4. The provisions of this Order shall not be construed as preventing the disclosure of any information in any motion, hearing, or trial held in this action or to any Judge or Magistrate Judge of this Court for purposes of this action.

Case 7:07-cr-01027-SCR Document 28 Filed 03/20/08 Page 3 of 3

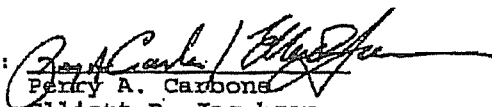
5. This Order is in addition to and does not  
supersede any prior protective order or stipulation.

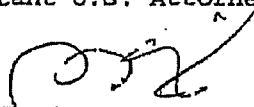
Dated: White Plains, New York  
March 19, 2008

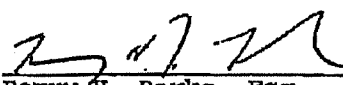
Accepted and Acknowledged:

UNITED STATES ATTORNEY  
MICHAEL J. GARCIA

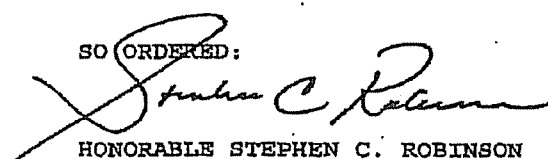
BY:

  
Perry A. Carbone  
Elliott B. Jacobson  
Assistant U.S. Attorneys

  
Defendant Bernard B. Kerik

  
Barry H. Berke, Esq.  
Eric A. Tirschwell, Esq.  
(Counsel for Bernard B. Kerik)

SO ORDERED:

  
HONORABLE STEPHEN C. ROBINSON  
UNITED STATES DISTRICT JUDGE